Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

EDDIE LINN SWAFFAR, JR., Petitioner

V.

W. C. SWAFFAR, EXECUTOR, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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36 pp

QUESTION PRESENTED

The United States Supreme Court has previously held that Fourteenth Amendment due process requirements regarding notice to *creditors* is implicated in state court probate proceedings. Petitioner, a *beneficiary* of his father's estate, was not given notice of the entry of probate court orders which took away part of his property interests in the estate. The Arkansas Supreme Court applied a state probate statute to cut off petitioner's right to appeal the orders because he did not file written objections to the orders within sixty (60) days from their entry. The question presented is whether the property interests of the beneficiary of an estate are subject to the same protections under the Fourteenth Amendment to due process in notice disputes as are the property interests of a creditor of an estate.

LIST OF PARTIES

In addition to petitioner Eddie Linn Swaffar, Jr., an heir to the estate, and respondent W. C. Swaffar, executor of the estate, another party with an interest in this matter is Brandon Swaffar, a minor, who is the only other heir to the estate. W. C. Swaffar was appointed by the trial court to act as guardian of Brandon Swaffar as well as executor of the estate. Brandon Swaffar was represented at trial and on appeal at the state level by counsel selected by his court appointed guardian, W. C. Swaffar.

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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Eddie Linn Swaffar, Jr., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Arkansas Supreme Court entered in the above-entitled case on February 10, 1997, with Petition For Rehearing denied On March 17, 1997.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at 327 Ark. 235, 938 S.W.2d 552 (1997) and is copied in the appendix hereto, infra, page 1a. The decree of the probate

court of Faulkner County, Arkansas is unpublished and is copied in the appendix hereto, infra, page 13a.

JURISDICTION

The judgment of the Arkansas Supreme Court (appendix, infra, page 1a) was entered on February 10, 1997. A timely Petition For Rehearing was denied on March 17, 1997 (appendix, infra, page 16a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendment 14, U. S. Constitution:

Sec. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Statutes Annotated, Sec. 28-1-116(d):

(d) When Appeal From Order Of Final Distribution Includes Appeal From Prior Orders. When an appeal is taken from the order of final distribution in the administration of a decedent's estate, all prior appealable orders and judgments to which the appellant has filed objections in writing within sixty (60) days after the order or judgment was rendered and from which an appeal has not been taken, except orders admitting or denying the probate of a will or appointing a personal representative, shall be reviewed at the election of the appellant. The appellant shall indicate the election by clearly stating in the appeal the orders which he desires to have reviewed.

STATEMENT OF THE CASE

This is a probate matter in Arkansas' state courts. The decision of the probate judge in Faulkner County, Arkansas, on a final accounting for the estate, was appealed to the Arkansas Supreme Court. There were four points for appeal raised by the petitioner, two of which pertained to charges against the estate for legal fees as well as a question about the interpretation of the decedent's will. The petitioner is the only adult heir.

There is one other heir who is the petitioner's minor brother. The estate is worth approximately one half million dollars. The Arkansas Supreme Court reversed and remanded in part and affirmed in part, refusing to consider Point II and Point III of the appeal. The issue remanded is limited to whether certain certificates of deposit are part of the estate and this issue cannot affect the "finality" of the state court's decision as it relates to the federal issues raised by this petition. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). Point II concerns the interpretation of the decedent's will as it relates to charges for rent against the petitioner for nearly $80,000. Point III concerns the reduction of the estate by $70,000 for fees awarded to the executor and his attorneys. The Arkansas Supreme Court declined to consider the merits of these two issues because, petitioner, an heir, had not filed a written objection to each order within 60 days of the order's entry, as required by Arkansas Statutes Annotated, Sec. 28-1-116(d), supra.

Petitioner did not have an opportunity to file written objections to these orders because they were filed without notice to petitioner during the extended history of this case. Although, his interest in the distribution of any property from the estate, by payment of fees or otherwise, was well known to

the executor, particularly since this has been a hotly contested matter, the executor did not give notice of the entry of the two orders. This occurred even though petitioner, in compliance with another Arkansas probate statute, Ark. Stat. Ann., Sec. 28-40-108, had filed and served on the executor and his attorney, a Request For Notice Of Proceedings in this probate matter. There is much in the record regarding the unwillingness of the executor to "notice" the only adult heir in this case. Particularly is this true where the orders in issue are concerned, as is evidenced by the very face of the documents.

Regarding the attorney fees, the *orders* approving those fees were filed at the same time as were the *petitions* seeking approval of those orders. This is shown by the clerk's stamp on the face of both sets of documents. (R. 51-59 and 84-86) No hearing was set. No notice of the petition or the order was given. The circumstance of these considerable fees for the executor's attorneys is, by itself, an acknowledgment of the contest surrounding this estate. However, the executor saw no need to "notice" the only adult heir or his attorney of this petition or of the immediate entry of this order. The Arkansas Supreme Court held that since the petitioner did not file a written objection to the order witnin 60 days of its entry, he can

not now appeal the probate court's decision to grant the order. The other order in issue, concerning the probate court's interpretation of the decedent's will and its effect of charging the petitioner $80,000 in rent for estate property, is based on a decision by the probate court announced in the court room on December 30, 1991. The executor's attorney was directed by the probate judge to draft the precedent. The precedent was then presented to the probate judge by the executor's attorney and signed on July 10, 1992. The face of the document indicates that it was not "entered" with the probate clerk until July 7, 1993, the following year. (R. 87-89) Petitioner was not notified of the entry of the order, which took place some eighteen months after the decision was announced. The Arkansas Supreme Court held that since the petitioner did not file a written objection to the order witnin 60 days of its entry, he can not now appeal the probate court's decision to grant the order.

REASONS FOR GRANTING THE PETITION

The United States Supreme Court has previously held that Fourteenth Amendment due process requirements regarding notice to *creditors* is implicated in state court probate proceedings. A beneficiary of an estate has just as much a "property interest" involved in estate proceedings as do the creditors of the same estate. The same Constitutional protections should be provided to beneficiaries of an estate and their property interests, as well as to creditors of the same estate and their property interests. The importance of this issue seems clear in light of the fact that each generation passes its entire property to the next, in accordance with state probate law.

The Supreme Court of the United States held in the case of *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), that the right to due process of law, under the guarantees of the Fourteenth Amendment, is applicable in probate matters in state courts. Specifically, the court held that creditors of an estate are entitled to actual notice of state action which adversely affects their property interests. To date the

Supreme Court has not had occasion, as for as petitioner is able to determine, to require actual notice to known beneficiaries of an estate, of petitions and court orders which adversely affect their interests in the estate. Yet, it seems that such an application of due process requirements for the protection of this form of property ownership or interests would follow logically and is long overdue.

In the opinion issued on February 10, 1997, the Arkansas Supreme Court refused consideration of Point II and Point III of the appeal. Point II concerns the interpretation of the decedent's will as it relates to excessive rental charges against the petitioner for $80,000. Point III concerns the award of fees to the executor and his attorneys of $70,000. The reason given in each case is that the petitioner did not file a written exception to these orders of the probate court as set out in Ark. Code Ann., Sec. 28-1-116(d), an argument first raised in the Appellee's Brief. *Absolutely no mention was made in the lower court proceedings by the executor of Sec. 28-1-116(d) nor were any arguments put forward by him on this point until he filed the Appellee's Brief.* This unfair circumstance is further evidenced by the fact that at no point in the decree of the probate court (appendix, infra, page 13a) (R. 221-223) is there

any mention of such an argument nor any recognition of Sec. 28-1-116(d) or its implications in cutting off the petition or arguments of petitioner put forward during trial. There is absolutely no doubt whatsoever that the very first time this statute was mentioned by the executor was when he raised this issue in the Appellee's Brief when it was presented to the Arkansas Supreme Court.

In petitioner's Reply Brief we responded to this first time argument by citing the decision of the U. S. Supreme Court in *Tulsa Professional Collection Services, Inc. vs. Pope*, supra, regarding notice requirements for probate proceedings where creditors are concerned. Had the petitioner the opportunity to treat this issue at trial, then we would have presented much more evidence of the executor's abject refusals to give notice of papers filed in the administration of this estate. This would be in addition to the evidence presented by the face of those documents and by the statements of counsel as shown at page 268 of the record:

> Mr. STRATTON: Your honor, whatever the records were. It was approved by the court and paid pursuant to court order.
>
> MR. NASH: Yes, sir. It was approved by the court. The whole petition and the order and everything was signed all in one day.

MR. STRATTON: Your honor, point of personal privilege. There's no demand by Mr. Nash, or his client, for any notice. There's a procedure for that. They're not entitled to it unless they demand it. (R. 268)

MR. NASH: ...I have asked Mr. Stratton, many times please send me copies of pleadings. He would not, has not. And I have simply had to go to the court clerk many times to see what he has filed. (R. 269)

Obviously, petitioner's *Request For Notice Of Proceedings* (R. 12), filed and served very early in this case, was never honored by the executor, nor was it acknowledged by the Arkansas Supreme Court in the opinion of February 10, 1997. Ark. Code Ann., Sec. 28-40-108, on which the petitioner's Request For Notice is based, was enacted in 1949. The specific language of subsection (b)(1) says:

> At any time after the issuance of letters, any person interested in the estate may, in person or by attorney, serve upon the personal representative or upon his attorney and file with the clerk of the court where the proceeding is pending, with a written admission or proof of service, a written request stating that he desires written notice by ordinary mail of the time and place of all hearings on the settlement of accounts, on final distribution, and on any other matters for which any notice is required by law, *by rule of court*, or by an order in the particular case. (Emphasis added.)

No doubt the reference to "rule of court" which is immediately distinguished from "an order in the particular case"

has to refer to basic procedural rules affecting the court involved, such as the Arkansas Rules Of Civil Procedure.

Rule 1. Scope Of Rules of the Arkansas Rules Of Civil Procedure states specifically that the Rules are applicable to probate proceedings. Rule 5. Service And Filing Of Pleadings And Other Papers, subsection (a) Service: When Required, says that:

> Except as otherwise provided in these rules, every pleading and *every other paper*, including all written communications with the court, filed subsequent to the complaint, except one which may be heard ex parte, shall be served upon each of the parties, unless the court orders otherwise because of numerous parties. (Emphasis added.)

Under the Reporter's Notes for this rule is the following information:

> Additions to Reporter's Note, 1985 Amendment: The first sentence of Rule 5(a) is amended to make plain that all correspondence between counsel and the court is to be served upon all parties. As the Reporter's Note to the original version of this rule indicates, the phrase "every other paper" is to be given an expansive reading and includes "all pleadings, papers and other documents generated in the lawsuit..." Without intending to limit the breadth of the term, this amendment simply specifies by way of illustration a "paper" falling within the rule. *Thus, the amended rule requires, for example, service of a precedent for judgment prepared at the court's request.* (Emphasis added.)

The *only* order by the probate court which interpreted the will and set the rental rate for estate property (Point II), was the order of July 7, 1993. (R. 87-89) The face of the document shows that the decision was announced on December 30, 1991, drafted by executor's counsel and presented to the probate court for signing on July 10, 1992, but not actually filed with the court clerk or "entered" until July 7, 1993. There was no notice given to petitioner of the extraordinary filing of this most important paper. Also, the evidence before the court, both from statements of counsel noted above, and from the face of several petitions and other papers filed, shows clearly that the executor's counsel customarily filed petition and order at the same time, and that he insisted that he did not have to, nor would he, give notice of papers filed which obviously affected petitioner's property interests. This was true on each of the petitions and orders approving fees for the executor and his attorneys. As the face of these documents show, none of them were served on the petitioner. A petition and an order allowing payment of $17,109 for the executor's attorneys were both filed at 8:53 am on August 20, 1992. (R. 84-86) A petition and an order for $16,593 for the executor's attorneys were filed on February 26,

1991 at 9:07 am and 10:00 am respectively. (R. 51-59) In fact, neither the Final Accounting (R 148-152) nor the Petition For Approval Of Final Accounting (R 153-155) show service on the petitioner.

It seems elementary that petitioner's constitutional right to due process of law is being violated when a statute such as Ark. Code Ann., Sec. 28-1-116(d), raised for the first time on appeal, or any of the other statutes discussed, cut off an essential right to appeal because the law is applied in such a way that:

1) it allows a fiduciary such as an executor to simultaneously file a petition and order taking many thousands of dollars away from the beneficiary, without notice whatsoever to the beneficiary so that he may object or so he will know that his time for appeal of the order is running.

2) it allows a fiduciary such as an executor to take six months to present a precedent to a probate judge and then to file it, without notice to the beneficiary, a full year after it was signed by the probate judge;

3) it allows a fiduciary such as an executor to ignore a request for notice filed under a state statute, obviously intended

to protect against unfair advantage and to discourage secrecy and misbehavior.

CONCLUSION

For the particular reasons stated above, the petitioner submits that his Petition for a Writ of Certiorari to the Arkansas Supreme Court should be granted, so as to provide a vehicle to extend the same Fourteenth Amendment protections of due process in disputes over notice in state court probate proceedings to protect the property interests of beneficiaries of an estate as have already been extended by the United States Supreme Court to protect the property interests of creditors of an estate.

RESPECTFULLY SUBMITTED,

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SUPREME COURT OF ARKANSAS

No. 96-751
Opinion Delivered 2/10/97

Eddie Linn Swaffar, Jr. Appellant, vs. W. C. Swaffar, Executor, Appellee	Appeal From The Faulkner County Probate Court, Third Division, No. P 89-63 Hon. Andre McNeil, Chancellor Affirmed In Part; Reversed And Remanded In Part.

DONALD L. CORBIN, Associate Justice

Appellant, Eddie Linn Swaffar Jr., appeals the order of the Faulkner County Probate Court approving the final accounting and denying his claim for set-off in the administration of the estate of his father, Eddie Linn Swaffar Sr. Appellee, W.C. Swaffar, is Appellant's uncle and executor of the estate. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(16) (as amended by per curiam July 15, 1996), as this case requires construction of a will. Appellant raises four points for reversal. We find merit to the first point and reverse and remand in part and affirm in part.

Facts and Procedural History

The decedent, Eddie Linn Swaffar Sr., died testate on April 8, 1989, of cancer after having survived severe burns he incurred in an accident at his welding shop in Conway, Arkansas. The decedents will named as executor Appellee W.C. Swaffar, the decedents brother, and placed all property of the estate into a trust for the benefit of the decedent's two sons, Appellant and a minor named Brandon Heath Swaffar. The will provided that the elder son be the guardian of the minor son and that each son would receive an equal share of the trust as follows: Upon reaching age 30, each would receive one-fourth of the trust; at age 35, another one-fourth; and at age 40, the remaining half of the trust. The will also provided that Appellant had the right to live in the decedent's home and "shall maintain said home in good repair and pay rent for the home and shop at $1,200.00 per month payable to the Trust."

This case is marked by much conflict between Appellant and Appellee. The conflict existed almost from the very beginning when Appellee sought to have his brothers will admitted to probate on April 12, 1989. No action was taken thereafter until September 11, 1989, when Appellant filed a petition to contest

the will, to remove Appellee as executor, and to demand an inventory. The conflict continued through the next six years, and there was much activity in the case. To recite all the activity would unduly lengthen this opinion. We do, however, mention some of these actions as they become relevant to our discussion of the merits of this appeal.

In July 1995, Appellee filed a final accounting accompanied by a petition for approval of the final accounting, final distribution, and for discharge as personal representative. Appellant filed objections to the final accounting and asserted a claim of set-off against any alleged debts against the estate. After a hearing on January 5, 1996, the probate court entered an order denying Appellants objections and claim for set-off and approving the final accounting. This appeal is from that order.

Certificates of Deposit

Appellant's first point for reversal concerns two certificates of deposit that Appellee listed on a document as items not included in the estate. Appellee admitted that his attorneys helped him prepare this document and that it was filed at some

point in the probate proceedings. This document was admitted as Appellant's Exhibit One during the hearing on Appellant's objections to the final accounting and lists one certificate of deposit at First National Bank payable to W.C. Swaffar in the amount of $54,986.40. The document lists the other certificate of deposit as being at First State Bank, payable to Brandon Swaffar or W.C. Swaffar in the amount of $40,180.84. The record does not disclose how or when these certificates of deposit were purchased, although Appellant alleges that they were purchased by Appellee with cash he obtained from the decedent. Of some significance to Appellant is the fact that this document also lists a life insurance policy in the amount of $10,000.00 with Brandon as beneficiary. Also of significance to Appellant is Appellee's testimony that the certificate of deposit in Appellee's name was also in the name "Eddie Lynn Swaffar," but failed to distinguish between the junior Swaffar or the senior Swaffar. Appellant argues these two facts are evidence that the decedent intended to make equal cash gifts to his two sons somewhere in the range of $50,000.00 each.

Appellant objected to the final accounting on the basis that it did not include these two certificates of deposit as property of the estate. Appellee testified at the January 1996 hearing that the certificates of deposit were held jointly with rights of survivorship in the names of the decedent and himself and Brandon and himself, respectively. As previously mentioned, Appellee admitted that the certificate of deposit bearing his name and the decedent's did not identify "Eddie Linn Swaffar" as either the junior or the senior Swaffar. On the basis of this testimony and other evidence indicating that the decedent was a successful businessman, the probate court ruled that the decedent purchased the certificates of deposit intentionally the way he did and that he would not substitute his judgment for the decedent's. The probate court said, "If he [the decedent] knew that a part of it was going to Brandon, and a part of it was going to his brother, that was his choice. And absent any proof to the contrary why it should not be, I'm leaving it there." (Emphasis supplied.)

On appeal, Appellant contends the probate court's ruling is

contrary to the law and evidence presented. Appellant's argument in support of this contention is twofold. First, he argues that it was Appellee's burden to prove that the certificate of deposit bearing Appellee's name was a gift from the decedent to Appellee. In support of this argument, Appellant relies on McDermott v. McAdams, 268 Ark. 1031, 598 S.W.2d 427 (Ark. App. 1980) Second, Appellant argues that the proof presented by Appellee did not establish that either certificate of deposit was a joint tenancy and therefore subject to ownership by anyone other than the decedent. In support of this argument, Appellant relies on Jones v. Robinson, 297 Ark. 580, 764 S.W.2d 610 (1989).

Appellee responds that Appellant's argument is barred because it was not timely raised below and because the record on appeal does not demonstrate error. First, Appellee contends that Appellant is barred from raising this issue now according to Ark code Ann. § 28-52-106 (1987) because he did not file an objection to the certificates of deposit until the final accounting. Appellee implies strongly that the document was filed as part of the initial accounting and, therefore, Appellant would have had to file an objection within sixty days pursuant to section 28-52-106. The record, however, does not

confirm that the document was filed as part of or along with the initial account. Likewise, the record does not confirm that the document was filed with the initial inventory or with any of the annual accountings. In short, the record does not disclose that the document was ever filed. Thus, we are left only with Appellee's testimony that the document listing the certificates of deposit was indeed filed at some point during the probate proceedings. Under such facts and circumstances, we will not apply section 28-52-106 to bar Appellant's objections. Second, Appellee contends that our review is barred because Appellant has not produced a record on appeal that demonstrates error. We agree that the record is insufficient for our review, but, for the reasons discussed below, we do not agree that on these particular facts and issues the insufficiency is Appellant's fault.

We agree with Appellant's assertion that the probate judge's ruling was contrary to the law. The issue in McDermott was who bore the burden of proof in probate proceedings when a beneficiary claimed title to property as a gift that the executor claimed belonged to the estate. The McDermott court looked to the general law of inter vivos gifts and concluded that "the common thread seems to be that whoever claims the gift was

made must prove it, regardless who initiated the inquiry." McDermott, 268 Ark. at 1040, 598 S.W.2d at 432. In so concluding, the McDermott court relied on Bennett v. Miles, 212 Ark. 273, 205 S.W.2d 451 (1947), which has facts remarkably similar to the facts of this case and which held that an executor who did not list a certain bank account as part of the estate bore the burden of proving that it had been a gift from the decedent. Like the McDermott court, the Bennett court looked to the general law on inter vivos gifts, which requires that the elements of an inter vivos gift be proven by clear and convincing evidence. The elements of an inter vivos gift are that the donor be of sound mind, have the clear intent to make a gift beyond recall, have actually delivered the subject matter of the gift to the donee or the donee's agent, and at the same time have released all future dominion and control over the property delivered. Bennett, 212 Ark. 273, 205 S.W.2d 451; Baugh v. Howze, 211 Ark. 222, 199 S.W.2d 940 (1947).

Consistent with McDermott and Bennett, we agree with Appellant that it was Appellee's burden to prove by clear and convincing evidence that the certificate of deposit bearing his name was a gift to him. McDermott, 268 Ark. 1031, 598 S.W.2d 427. The probate judge stated that he was ruling for

Appellee "absent any proof to the contrary[.]" To the extent that the probate court shifted the burden of proof on this issue to Appellant to prove the negative proposition that the certificate of deposit was not a gift, the probate court erred. See McDermott, 268 Ark. at 1040, 598 S.W.2d at 432. We must, therefore, reverse and remand this case for further consideration under the appropriate standard of proof.

On remand, we note that the burden of proof on the question of whether the decedent meant to make a gift to his son Eddie Linn Swaffar Jr. is on Appellant. Likewise, the burden of proof on the question of whether the decedent made a gift to Appellee or Brandon lies with Appellee and Brandon respectively.

The probate judge's application of an erroneous standard of proof precludes any meaningful review of Appellant's remaining argument that the evidence is insufficient to establish that either of the two certificates of deposit were subject to the ownership of anyone other than the decedent pursuant to Jones, 297 Ark. 580, 764 S.W.2d 610. Jones held that the "designated in writing" requirement of Ark. Stat. Ann. § 67-552 (Repl. 1980) be complied with substantially. Section 67-552, which governs titles to accounts and certificates of deposits held in two

or more names, was amended significantly in 1983 and is currently codified as Ark. Code Ann. § 23-52-1005 (1987). As there was no evidence of when these particular certificates of deposit were issued, we cannot determine which version of the statute applies to the facts of this case. Moreover, as neither the certificates of deposit nor any other writing or bank record was admitted into evidence, the record lacks sufficient evidence for the probate judge to have determined who had title to these two certificates of deposit. Because we think the lack of evidence is due to the effect of the probate court's application of an erroneous standard of proof, we remand for further development as to the facts of ownership of these certificates of deposit.

Appellant also assigns as error the probate judge's decision on unpaid rent to the estate, executors fees, attorneys' fees, and Appellant's claim for set-off. We affirm these rulings for the following reasons.

Unpaid Rent on Shop

Appellant's second point for reversal concerns the $80,836.40 in accrued and unpaid rent on the decedent's welding shop that was charged against Appellant in the final accounting.

Appellant's failure to comply with Ark. Code Ann. Sec. 28-1-116(d) (1987) and file written objections to the 1991 and 1993 orders concerning the rent on the shop bars our review of this issue.

Executor's and Attorney's Fees

As his third point for reversal, Appellant contends that the trial court erred in approving the $69,884.45 in fees requested by Appellee as executor and by his attorneys, Phil Stratton, who originally represented Appellee but sought retirement during the case, and the firm of Barber, McCaskill, Jones & Hale, which the probate court allowed to be substituted as counsel for Appellee.

All fees paid to the Barber Firm were requested by petition and approved by order of the probate court. Appellant did not file written objections to these orders. Therefore, he cannot now appeal them pursuant to section 28-1-116(d). As for the other fees paid to Mr. Stratton and Appellee, Appellant offers no evidence that the fees are unreasonable or contrary to the amounts allowed by statute, Ark. Code Ann. S 28-48-108 (1987). In the absence of any proof that the fees are unreasonable or in violation of the statute, we affirm the probate

judge's exercise of discretion in allowing these fees. See Morris v. Cullipher, 306 Ark. 646, 816 S.W.2d 878 (1991).

Set-off

Appellant filed a claim for set-off against any claims due him from the estate for his attorney's fees incurred in the six-year-long history of this estate. Appellant's claim for set-off is based primarily upon his efforts in Pulaski County Circuit Court to obtain the return to the estate of the land valued at $361,500.00. Probate courts do not have jurisdiction to award fees for services rendered to individual beneficiaries. Paget v. Brogan, 67 Ark. 522, 55 S.W. 938 (1900). We therefore affirm the probate court's denial of Appellant's claim for set-off.

For the reasons aforementioned the part of the probate court's order denying Appellant's request to include the two certificates of deposit in the estate is reversed, and the case is remanded for further development of this issue. All remaining parts of the probate court's order are affirmed.

IN THE PROBATE COURT OF FAULKNER COUNTY, ARKANSAS (R. 221-223)

Eddie Linn Swaffar, Jr. Petitioner

vs. No. P 89-63

W. C. Swaffar, Executor Respondent

DECREE

On this 5th day of January, 1996 comes on for hearing the petition for approval of the final accounting by the executor and petitions of Eddie Swaffar, Jr. and the executor appearing in person and by his counsel, Phil Stratton, Eddie Swaffar, Jr. appearing in person and by his counsel, J. R. Nash, and Brandon Swaffar appearing by his guardian and by his attorney ad litem, Dale Lipsmeyer, and the Court finds:

1. The petition of Eddie Swaffar, Jr. to have the Court find two certificates of deposit obtained by the decedent during his lifetime to be assets of the estate should be and the same is hereby denied.

2. The petition of Eddie Swaffar, Jr. to disallow fees paid by the estate to the Barber law firm for the successful defense of a will contest and for the successful defense of a claim by Billy

McKim to be a pretermitted child should be and the same hereby is denied. (R. 221)

3. The claim by J. R. Nash for quantum meruit attorneys fees for legal services performed on behalf of Brandon Swaffar, minor devisee under terms of his father's will, should be and hereby is denied for the reason the Court is without subject matter jurisdiction and if it had jurisdiction the Court finds no privity of contract existed and any claim of representation fails in that it was adversarial in character as to Brandon Swaffar whose interest would have been reduced from one-half of the net estate to one-third of the net estate had Mr. Nash been successful in pursuit of the claim of Billy McKim.

4.The fees allowed by the executor in the final accounting, in addition to the statutory schedule, were necessary, reasonable and proper for the defense of a personal injury claim against the decedent and his estate and the same should be and hereby is approved.

5. The petition of Eddie Swaffar, Jr. to abate a portion of the rents imposed by terms of his father's Will should be and the same hereby is denied. (R. 222)

6. The allocation by the executor of one-half of the debt owed the estate by Eddie Swaffar, Jr. as an advancement to

Eddie Swaffar, Jr. and crediting the other half of the debt to Brandon Swaffar's distributive share was in all respects proper and should be and hereby is approved.

7 .The petition of Brandon Swaffar to surcharge interest on the debt owed the estate by Eddie Swaffar, Jr., was withdrawn without prejudice.

8. The claim of set-off by Eddie Swaffar, Jr. should be and the same hereby is denied.

9. The final accounting presented by the executor should be and the same hereby is approved in all respects. (R. 233)

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

March 17, 1997

J. R. Nash
Attorney at Law
923 Pyramid Building
Little Rock, Arkansas 72203

Re: 96 00751 Eddie Linn Swaffar, Jr. vs. W. C. Swaffar, Executor

Dear Mr. Nash:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

Leslie W. Steen,

Clerk
LWS: rh
cc: Phil Stratton
Richard C. Kalkbrenner
Jerome D. Lipsmeyer
Sharon Rimmer, Clerk
(#P89-63)

Supreme Court, U.S.
FILED
JUL 17 1997
CLERK

(2)

No. 96-1991

**IN THE SUPREME COURT
OF THE UNITED STATES**

October Term 1996

EDDIE LINN SWAFFAR, JR., Petitioner

V.

W. C. SWAFFAR, EXECUTOR, Respondent

**ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT**

BRIEF IN OPPOSITION

**JOHN S. CHERRY, JR.
BARBER, MCCASKILL, JONES
& HALE, P.A.
2700 First Commercial Building
400 West Capitol Avenue
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COUNSEL FOR RESPONDENT**

29 pp

QUESTION PRESENTED

Whether Petitioner is entitled to Fourteenth Amendment due process protection and relief where there is insufficient state action and where Petitioner had a full and fair opportunity to litigate the matters he now claims were incorrectly barred from appellate review by the Arkansas Supreme Court?

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TO THE HONORABLE SUPREME COURT:

The Respondent, W.C. Swaffar, respectfully requests that This Court deny the Petition for Writ Of Certiorari submitted by Petitioner, Eddie Linn Swaffar, Jr.

STATEMENT OF THE CASE

Respondent adopts the statement of the case as set forth by the Arkansas Supreme Court in its Opinion on this matter. See Appendix to Petitioner's Brief at 1a. *Swaffar v. Swaffar*, 938 S.W.2d 552 (Ark. 1997).

REASONS FOR DENYING THE WRIT

There Is No State Action Involved

The Petitioner alleges no *state action* which would warrant the application of the Fourteenth Amendment guarantees of due process of law. The Fourteenth Amendment protects a property interest only from a deprivation by state action. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). The Petitioner alleges that the Respondent, *as executor*, failed to provide him notice of the filing of petitions for authority to pay attorneys' and executor's fees and notice of the entry of an order concerning Petitioner's obligation to pay rent to the estate resulting from a hearing in which Petitioner's counsel attended and participated. Although the executor was appointed pursuant to state law, namely Ark. Code Ann. §28-40-119 (1987), the enactment of which is a state action, the actions complained of by the Petitioner are acts

of a private party and the State's involvement falls far short of the type of state action required to invoke the guarantees of the Due Process Clause. The State's involvement in the running of the limitations period established by Ark. Code Ann. §28-1-116(d) (1987) is not sufficient to implicate due process. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Nor is private use of a State procedure or remedy a state action sufficient to make the implication. *Short*, *supra*, and *Brooks*, *supra*.

Petitioner Had A Full and Fair Opportunity to Litigate and the Arkansas Supreme Court Reached the Correct Result

The Petitioner had a full and fair opportunity to litigate the merits of the issue he now presents and the Arkansas Supreme Court reached the correct decision on the issue. Petitioner is unpersuasive in his attempt to align his argument with this Court's decision in *Tulsa Collection Servs. v. Pope*, 485 U.S. 478 (1988). *Pope* involved a

probate non-claim statute which foreclosed a creditor's claim against an estate *ab initio* if such claim was not presented within two months of the publication of the notice. *Id.* at 479. There is no similarity here as Petitioner had a full and fair opportunity to litigate the merits of each and every issue he now attempts to raise with this Court.

Since this probate proceeding was commenced in 1989, Petitioner litigated innumerable issues including a full trial on the merits to contest the decedent's will and to determine the existence of a pretermitted heir and a subsequent appeal of that decision. *Swaffar v. Swaffar*, 827 S.W.2d 140 (Ark. 1992). Additionally, on his Objection to Final Accounting of Executor the Petitioner had a full hearing during which he had an *opportunity* to present evidence on every issue of which he now seeks review. The probate court rejected these arguments

resulting in another appeal to the Arkansas Supreme Court which Petitioner alleges provides the basis for this Writ. *Swaffar v. Swaffar*, 938 S.W.2d 552 (Ark. 1997).

Petitioner appears to place great significance on the fact that Ark. Code Ann. §28-1-116(d) was not raised by Respondent before the probate court. See Petitioner's Brief at page 8. However, section 28-1-116(d) is a statute which precludes probate issues from being considered by an appellate court which were not properly preserved with the trial court. By its very design and purpose, section 28-1-116(d) is not applicable until issues are appealed. Petitioner, nonetheless, is charged with knowledge of the statute. Respondent prevailed on all objections to his final accounting and there was clearly no reason for this statute to be raised by Respondent until an appeal ensued. Moreover, under Arkansas law, if the trial court reaches the right result for the wrong reason the decision will not

be disturbed on appeal. *In Re: Estate of F.C.*, 900 S.W.2d 200 (Ark. 1995).

Furthermore the Petitioner does not allege that he discovered the entry of the orders outside the 60-day objection time nor that he had no actual knowledge of the entry of the orders at the time he filed his Objection or by the time it was heard. The Petitioner, knowing of the entry of the orders and complaining of their entry without notice to him at the hearing, merely failed to make his proof that the attorneys' and executor's fee were unreasonable or excessive and should not have been allowed. (R. 392-393).

As to the attorneys' and executor's fee issue, it is clear from the Opinion that all fees awarded to Respondent and attorney, Phil Stratton, were indeed considered by the Arkansas Supreme Court. The Court held, however, that *Petitioner presented no evidence to show why these fees were in any way unreasonable or excessive*. See Appendix

to Petitioner's Brief at 11a-12a. The burden of proof is always placed on the party challenging such fees under Arkansas law and the award is discretionary with the probate court. *Morris v. Cullipher*, 816 S.W.2d 878 (Ark. 1991).

As to Petitioner's argument on the rent imposed upon him for occupying estate property, it is undisputed that counsel for Petitioner was present and presented argument at the hearing before the probate court and counsel for Petitioner could have filed an objection or motion for rehearing at any time after the decision was announced in Court. (R. 87-89; 391-392). Relying on section 28-1-116(d), the Arkansas Supreme Court refused to consider this issue because these required procedures were not followed.

All of these issues were fully presented to the probate court over the long history of this estate

proceeding. Petitioner has failed to show the decision of the Arkansas Supreme Court was in any way erroneous.

Petitioner Failed to Preserve the Issue on Appeal

The Petitioner's Objections to Final Accounting of Executor filed July 8, 1995, which is included (without exhibits) in Respondent's Appendix at (1a), does not raise the specific question now presented; it was never raised in this form at the trial court during the hearing on the Objection; and it was only raised to the Arkansas Supreme Court in Petitioner's Reply Brief although not in his original brief to the Arkansas Supreme Court. (Appellant's Reply Brief 6-7). The Arkansas Supreme Court will not consider even Constitutional arguments raised for the first time on appeal. *Morrison v. Jennings*, 943 S.W.2d 559 (Ark. 1997). The Objection of the Petitioner questioned attorneys' fees paid in 1994 and 1995 and the Petition for Writ objects to attorneys' fees paid in 1991 and 1992. The

Petitioner has therefore *failed to raise and preserve this issue* for appeal.

Petitioner's Question Is Not of Significant Public Importance and Could Not Frequently Recur

The Petition for Writ of Certiorari should be denied because the facts presented are specific to this individual case and are not likely to recur. While the facts demonstrate this issue may have individual significance to Petitioner, there is nothing to show these facts will be repeated or that a decision on the merits of this case would have any effect on probate proceedings or the public interest. *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951).

CONCLUSION

The Petition Writ of Certiorari should be denied as it does not satisfy any of the reasons this Court considers in exercising its discretion as provided by Rule 10 of this Court. The Petitioner has alleged no state action sufficient

to implicate the Due Process Clause of the Fourteenth Amendment. The Petitioner had a full and fair opportunity to litigate the question now presented and the Arkansas Supreme Court reached the correct decision. The Petitioner failed to previously raise and preserve the question on appeal. The question presented is not of significant importance to public interest or effective probate administration to warrant United States Supreme Court review.

Respectfully submitted,

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APPENDIX

Page

Objections to Final Accounting
of Executor . . . . . (1a)

IN THE PROBATE COURT OF FAULKNER COUNTY, ARKANSAS

IN THE MATTER OF THE ESTATE OF EDDIE LINN SWAFFAR, DECEASED NO. PR 89-63

OBJECTIONS TO FINAL ACCOUNTING OF EXECUTOR

Eddie Linn Swaffar, Jr., contestant, who is interested in the estate of Eddie Linn Swaffar, deceased, as one of decedent's two heirs at law, by J. R. Nash, his attorney, files these exceptions and objections to the final accounting of W. C. Swaffar, the executor of the decedent, filed on or about July 6, 1995:

1. Contestant particularly objects to the failure and refusal of the executor to include in the Schedule A. Charges to Accountant those assets of Eddie Linn Swaffar, deceased, shown on the list titled "Items not included in inventory" which was information obtained from the executor's representative and which shows various assets of Eddie Linn Swaffar, deceased, at the time of his death and

which the executor has consistently refused to include in the estate. In spite of contestant's efforts through this court and through the Circuit Court of Pulaski County to force the executor to include all of these items as estate assets, none of the "right of survivorship bank accounts" section of said list is shown as an asset of this estate as they rightfully should be. A copy of said list is attached hereto as Exhibit A. Since each of these items, without question, was an asset of Eddie Linn Swaffar, deceased, at the time he died then the burden is on the executor to show that the property does not belong to his heirs. See McDermott vs. McAdams, 268 Ark. 1031, 598 SW2d 427 (1980), wherein the Arkansas Supreme Court charged that a "gift" claimed by an executor such as in this case requires that it be "scrutinized with the most jealous care." Clearly, this is the case with the C.D. valued at $54,986.40 which the executor has claimed for himself as well as the C.D.

valued at $40,180.84 which the executor has awarded to Brandon Swaffar, the only other heir.

2. Contestant particularly objects to the following items included under Schedule A. Charges to Accountant:

a. Balance remaining in hands of accountant on 5/30/94. The item is vague and is based on vague and inaccurate accountings filed previously by the executor which do not identify precisely what assets are included in the estate or where they came from. And, "As long as an administration is pending, it is the duty of the probate court, even in the absence of exceptions, to inquire into an account filed and to require the personal representative to account for all funds coming into his hands." See Price vs. Price,Adm'x, 253 Ark. 1124, 491 SW2d 793 (1973).

b. Accrued rent through May, 1995. This item does not indicate what property this rent is for nor who owes the rent and what period of time is involved. It is

impossible for anyone reviewing this accounting to determine the validity of this item and contestant demands more definite and certain information.

c. Sale of horses and head chute by Eddie, Jr. This item does not indicate if the executor received this amount of money directly or whether it is a charge against Eddie Linn Swaffar, Jr. as a distribution. Contestant demands more definite and certain information.

d. Increase in value of real estate. Contestant supposes this is the difference between the value of the real property put back into the estate under court order as appraised by the executor versus the value set by the Board Of Commissioners appointed by the court during August of 1995. If that is incorrect then contestant demands more definite and certain information.

3. Contestant particularly objects to the following items included under Schedule B. Credits to Accountant:

a. Credits for Barber Law Firm for October 1994, and December 1994. Mr. Stratton, the attorney for the executor, petitioned the court in 1989 to associate another attorney because he was in the process of retiring and could not handle the matter on his own. Subsequently, four lawyers from Barber Law Firm assisted Mr. Stratton, and they have already charged and been paid over $18,000.00. There is no information furnished by the executor as to what these charges are for, why more help was necessary, and whether they were authorized by the court. Contestant demands more definite and certain information.

b. Credits for Phil Stratton (attorney fee of $19,537.75) and W.C. Swaffar (executor fee of $9,780.33). As above noted, Mr. Stratton early on represented to the court that he was in the process of retiring. Other attorneys doing his work have already been paid $18,000.00 and have additional payments pending of

at least $1,700.00 for some recent unknown work for the executor. Accordingly, if Mr. Stratton's fee has any statutory basis then it should be reduced by what has already been charged to the estate for legal representation of the executor. The record does show that during the will contest, the executor had five lawyers in the courtroom representing his interest. Also, the record does show that both the executor and his attorneys have fought hard to keep the value of this estate at a low level and they should not now be awarded more than forty thousand dollars in legal fees and ten thousand dollars in executor fees for failing in that effort. The contestant demands more definite and certain information on these credits and the opportunity to question the claimants.

c. Credit for Faulkner County Title in the amount of $677.00. This item should have been paid by the purchaser of property from the estate and not by the estate.

Contestant demands more definite and certain information.

4. Contestant particularly objects to the following items included under Schedule C. credits for money paid or assets delivered to distributees:

a. Credit for prior distribution to Eddie Swaffar, Jr. plus accrued rent and proceeds from sales of estate property - $98,636.40. After a deduction from this figure in the amount of $17,800.00 for the purchase by Eddie Linn Swaffar, Jr. of the Conway Welding Company, his father's business, as ordered and approved by the court as an advancement, the remainder of $80,836.00 appears to be for rent on the shop building where the business was located and on an adjoining house where Eddie, Jr. and his wife have lived since his father's death. This item also gives the appearance of an actual distribution of funds to Eddie, Jr. and such is not the case. No funds have been dispersed to him. Rather, this is a grossly exaggerated

rental charge for occupying a thirty year old house for five years and a concrete block shop building for two years, both of which, together, were appraised at a total of $88,000.00 when Eddie Linn Swaffar, Sr. died six years ago. Moreover, a charge against Eddie Linn Swaffar, Jr.'s interest in this estate of $1,200.00 per month would have to be in direct conflict with the Will of Eddie Linn Swaffar, Sr. as of October 13, 1990 when Eddie Jr. purchased his father's business from the estate. According to the Will, Eddie, Jr. may rent the house and "shop" for a maximum of $1,200.00 a month if he so chooses. It is clearly a permissive benefit for an heir who was helping to run the business before Eddie, Sr. died. The "shop" is obviously an ongoing business with numerous assets of its own. Once Eddie obtained complete ownership of Conway Welding Company, the "shop" was his own except for the concrete block building where the business was located. A

copy of the Bill Of Sale for the business is attached hereto as Exhibit B.

Both the executor and his attorney are on record in court as acknowledging the true meaning of the term "shop" as used by Eddie Linn Swaffar, Sr. in his Will and the fact that $1,200.00 a month rent for the two physical structures (the house and the shop building) are inequitable and impractical. This is evident from the statements made by the executor's attorney at the hearing held before this court on December 19, 1989, when he described an agreement where Eddie Linn Swaffar, Jr. was to receive ownership of the business and the rent on the house and shop building was to be a total of $590.00 a month. A copy of a partial transcript of the hearing of December 19, 1989, is attached hereto as Exhibit C. A final note: this shop building was closed and given up to the executor in January of 1992, yet the executor, who failed to do

anything with this building since that time, wants to charge an heir an exorbitant rental fee based upon an admitted misinterpretation of the Will.

b. Fiduciary deeds to W. C. Swaffar , Trustee for the use and benefit of Eddie Linn Swaffar, Jr. and Brandon Swaffar as tenants in common. The so-called trusteeship of W. C. Swaffar is contrary to law since the Will of Eddie Linn Swaffar, deceased, calls for a passive trust which is already executed. The deeds should be directly to the heirs to reflect their ownership since the moment their father died. Also, no adequate legal description is given and confusion over what land is now included in this estate should be avoided at all costs. The contestant demands the opportunity to question the executor as to whether there is other property he knows about to be included in this estate and particularly whether there are any recorded or unrecorded deeds which apply to the interest of the heirs to

this estate.

c. Transfer to W. C. Swaffar, Trustee for the use and benefit of Eddie Linn Swaffar, Jr. and Brandon Swaffar remaining cash assets ($107,216.26). The charges shown here against the interest of Eddie Linn Swaffar, Jr. are based upon exaggerated rental charges and misconstruction of the Will as set out in the objection stated at paragraph 4 (a) above.

5. Contestant particularly objects to the failure of the executor to show any treatment in the final accounting for the claim of Eddie Linn Swaffar, Jr. for a set-off against any claims of the estate against him and for the claim of J. R. Nash for compensation from the estate for services rendered in behalf of Brandon Heath Swaffar.

6. Contestant particularly objects to the failure of the executor to show payments from the estate to or in behalf of Brandon Heath Swaffar as a distribution to said

heir.

7. Contestant reserves the right to timely supplement these objections and exceptions to the final accounting by the executor.

8. Contestant requests a hearing so that he may examine the executor on the noted objections and exceptions and to put on other evidence.

WHEREFORE, contestant, Eddie Linn Swaffar, Jr., respectfully requests that a hearing be held on the Final Accounting By Executor filed herein on or about July 6, 1995; that he be allowed to examine the executor on the noted objections and exceptions to said accounting and all other accountings filed herein; that the Final Accounting By Executor be disapproved and rejected; and that the court refer the account to a qualified auditor for examination and restatement.

Respectfully submitted,

EDDIE LINN SWAFFAR, JR.
HEIR HEREIN

BY: /s/ J.R. Nash (70051)
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